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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SMS.ac, INC.,

Plaintiff and Appellant,

v.

SEAN ROWLAND,

Defendant and Respondent.

D048285

(Super. Ct. No. GIC 834740)

APPEAL from an order and a judgment of the Superior Court of San Diego County, Richard E.L. Strauss, Judge. Order reversed, judgment affirmed as modified.

SMS.ac, Inc. (SMS.ac) appeals from an order granting Sean Rowland attorney fees after it dismissed its action against him for breach of contract, misappropriation of trade secrets and defamation, and the judgment thereon. It contends that the attorney fee provision in its underlying contract with Rowland authorizes a recovery of fees only in an action to "enforce, interpret or obtain a declaration of rights" thereunder and thus does not

authorize the recovery of fees incurred in defending against tort causes of action. We agree and reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

In October 2003, SMS.ac hired Rowland to provide it with consulting services. In August 2004, several months after Rowland stopped doing consulting work for it, SMS.ac filed this action against him, alleging that he had made numerous false and defamatory comments about it and its principals on the Internet. Although the court denied Rowland's special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16, SMS.ac later dismissed the action. Rowland thereafter moved to recover his attorney fees pursuant to a provision in a contract he entered into with the company when he started working for it. The court granted the motion, awarding Rowland \$49,156.80 in fees, and entered judgment in his favor. SMS.ac appeals.

## DISCUSSION

Subject to several statutory exceptions, California follows the American rule, which requires parties to a lawsuit to pay their own attorney fees, regardless of whether they were successful in the lawsuit. The American rule is codified in Code of Civil Procedure section 1021, which states in pertinent part "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys . . . is left to the agreement, express or implied, of the parties . . . ." (*Trope v. Katz* ( 1995) 11 Cal.4th 274, 278-279.) Although parties retain a broad right under this provision to "contract out" of the American rule, that right is subject to the restrictions

and conditions of Civil Code section 1717 in cases to which that statute applies. (*Trope v. Katz, supra*, 11 Cal.4th at p. 279.)

In accordance with Civil Code section 1717:

"(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

".....

"Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

.....

"(b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. . . .

"(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

Pursuant to this statute, a defendant is not entitled to recover attorney fees incurred in defending against contract-based claims where, as here, the plaintiff voluntarily dismisses its claims prior to trial, as Rowland essentially concedes. However, section 1717 does not apply to noncontract claims (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 602, 617, 619 (*Santisas*)) and thus, the question presented here is whether Rowland is nonetheless entitled to recover attorney fees he incurred in defending against SMS.ac's tort claims against him.

The recoverability of fees incurred in defending against tort claims pursuant to a contractual fee provision turns on what the parties to the contract intended at the time of contracting, at least in theory. (See *Santisas, supra*, 17 Cal.4th at p. 608.) Determining such intent is often a difficult task given that, as a practical matter, parties entering into a contract do not generally anticipate the onset of problems and thus are not likely to give much thought as to which party should be entitled to recover attorney fees, and under what circumstances, in the event of litigation. Perhaps for this reason, the parties frequently do not offer extrinsic evidence as to their initial intent and, as here, the court must look to the language of the contractual provision itself to determine whether the party seeking fees has "prevailed" and whether the type of claim is one for which an attorney fee award is contemplated thereby. (*Santisas, supra*, 17 Cal.4th at pp. 602, 608-609, citing in part Civ. Code, §§ 1636, 1638, 1639.)

Here, the contractual attorney fee provision reads as follows:

"[i]f either party commences or is made a party to *any legal proceeding to enforce, interpret or obtain a declaration of rights under this agreement*, the prevailing party shall be entitled to recover from the other party all attorneys' fees and costs incurred in connection with such proceeding or any appeal or enforcement of any judgment obtained in any such proceeding." (Italics added.)

Rowland contends that the language of the contractual attorney fee provision in this case is broad enough to entitle him to recover fees relating to SMS.ac's noncontract claims against him. However, we agree with the analysis of *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708 (*Exxess Electronixx*) to the contrary and reject his contention.

In *Exxess Electronixx*, a commercial lessee brought an action for declaratory relief, constructive fraud, breach of fiduciary duty and equitable relief against its real estate broker based on allegations that the broker failed to disclose defects in the leased property. (*Exxess Electronixx, supra*, 64 Cal.App.4th at p. 704.) After the parties settled and the lessee dismissed its claims against the broker, the court awarded the broker attorney fees pursuant to a lease provision authorizing such an award to the prevailing party in "an action or proceeding to enforce the terms hereof or declare rights hereunder." (*Id.* at pp. 702-703.) The award of fees was reversed on appeal.

The Second District Court of Appeal recognized that since the lessee had dismissed its claims against the broker, Civil Code section 1717, subdivision (b)(2) precluded an award of fees relating to the declaratory relief cause of action because that cause of action was one "on a contract" within the meaning of the statute. (*Exxess Electronixx, supra*, 64 Cal.App.4th at p. 706.) Because Civil Code section 1717 did not apply to noncontract claims, the court went on to determine whether the language of the attorney fee provision authorized the recovery of fees relating to the lessee's tort claims for constructive fraud and breach of fiduciary duty and equitable claims for contribution and equitable indemnity. (*Exxess Electronixx, supra*, 64 Cal.App.4th at pp. 708-716.) The court reasoned that "[b]ecause [Civil Code] section 1717 does not encompass tort claims [citations], it follows that tort claims do not 'enforce' a contract." (*Exxess Electronixx, supra*, 64 Cal.App.4th at p. 709.) We agree. (See also *Rosen v. Robert P. Warmington Co.* (1988) 201 Cal.App.3d 939, 941, fn. 1 [disallowing fees for defending against contract and tort claims after a pretrial dismissal, where the contract provision

authorized fees in "any action to . . . enforce any . . . provision, condition or agreement of this lease"], cited with approval in *Santisas, supra*, 17 Cal.4th at p. 622, fn. 9.)

Rowland points out that the contractual fee provision in *Exxess Electronixx* did not refer to an action to "interpret" the agreement as the provision did here and contends that this distinction renders *Exxess Electronixx* inapplicable. However, the scope of a provision authorizing fees for an action to enforce, interpret or declare rights under the agreement is not substantively different than a provision authorizing fees in an action to enforce or declare the parties' rights thereunder.

Moreover, the authorities cited by Rowland are not to the contrary. For example, in *Thompson v. Miller* (2003) 112 Cal.App.4th 327 (*Thompson*), the minority shareholders in a closely held corporation sued the majority shareholder for breach of fiduciary duty, fraud and rescission after he bought their shares in the company. (*Id.* at pp. 330-332.) The majority shareholder defended against these claims on the ground that the stock purchase agreements signed by the minority shareholders stated that they had not relied on the majority shareholder's representations in making the decisions to sell their stock. (*Id.* at pp. 330-332.) After a defense verdict at trial, the majority shareholder sought to recover his attorney fees pursuant to a provision of the stock purchase agreements authorizing "[t]he prevailing party in any dispute under this Agreement [to recover] reasonable attorneys fees incurred in such dispute." (*Id.* at p. 333.)

Reversing the trial court's denial of fees, the appellate court concluded that the attorney fee provision was broad enough to apply in a situation where a provision of the agreement was used in defense in an action. (*Thompson, supra*, 112 Cal.App.4th at p.

330.) It held that there was "[a] major difference" between the attorney fee provision in the stock purchase agreements, which provided for an award of fees in "any dispute" thereunder, and a provision authorizing fees only in an action to enforce the terms of the agreement or for a declaration of the parties' rights under the contract, such as the provisions involved in *Exxess Electronixx* and here. (*Thompson, supra*, 112 Cal.App.4th at p. 335.) For this reason, the analysis and holding in *Thompson* do not assist Rowland.

Similarly, in *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338 (*Xuereb*), purchasers of real estate sued a real estate agent and real estate broker for negligence, products liability, fraud, misrepresentation, breach of fiduciary duty and breach of contract arising out of the property purchase, contending that the agents failed to competently inspect the property and negligently handled the transaction. (*Id.* at pp. 1341, 1343.) After the jury returned a verdict in the realtors' favor, they sought to recover their attorney fees pursuant to the purchase agreement, which provided in relevant part "[i]f this agreement gives rise to a lawsuit or other legal proceeding between any of the parties hereto . . . , the prevailing party shall be entitled to recover actual court costs and reasonable attorneys' fees . . . ." (*Id.* at p. 1340.)

The appellate court reversed an order denying the realtors' fee motion, concluding that the circumstances of the transaction justified an "expansive" reading of the attorney fee provision and that such an interpretation supported the conclusion that "gives rise to" encompassed any acts or omissions occurring in connection with the agreement and the entire transaction to which the agreement referred. (*Xuereb, supra*, 3 Cal.App.4th at p. 1344.) In so concluding, the court specifically distinguished the provision before it from

provisions that limited an award of fees "to actions . . . brought to interpret or enforce a contract." (*Id.* at pp. 1342-1343.) Because the language of the provision at issue in this case is so limited, *Xuereb* fails to support for Rowland's position here. (See also *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1831 [similar, any "legal action . . . relating to [the contract]"].)

Based on the applicable principles of law, we conclude that SMS.ac's tort causes of action against Rowland were not within the scope of the attorney fee provision in the agreement between the parties and thus that Rowland was not entitled thereunder to recover attorney fees he incurred in defending against those claims. We reverse the order awarding Rowland his attorney fees and modify the judgment accordingly.

#### DISPOSITION

The order awarding Rowland his attorney fees is reversed. The judgment is modified to deny his fee request. SMS.ac is entitled to recover its costs on appeal.

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McINTYRE, J.

WE CONCUR:

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McCONNELL, P. J.

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AARON, J.